Filed 3/10/09 In re J.C. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re J.C. et al., Persons Coming Under the Juvenile Court Law.	B209816 (Los Angeles County Super. Ct. No. CK73146)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. R.S., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Donna Levin, Juvenile Court Referee. Affirmed.

Christopher R. Booth, under appointment by the Court of Appeal, for Appellant.

Raymond G. Fortner, County Counsel, James M. Owens, Assistant County Counsel, and Melinda White-Svec, Deputy County Counsel, for Respondent.

Appellant R.S. (Mother) appeals the dispositional order under which her two sons, J.C. and D.S., were removed from her custody and placed with D.S.'s paternal grandparents.[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The family came to the attention of DCFS on May 26, 2008, when Mother's three and one-half month old nephew, G.M. (the son of her sister, C.M.) was taken to the emergency room. G.M. had been left in Mother's care when the boy's parents -- both in the military -- were ordered to Iraq. At the time, Mother, J.C., D.S. and G.M. were living with S.V., whom Mother had begun dating in October 2007 and had lived with since January 2008. On the day of the incident, Mother had gone out to get her nails done, leaving all three boys with S.V. While she was out, S.V. called and told her G.M. was not breathing. Mother quickly returned home, tried CPR and called 911. G.M. was hospitalized, diagnosed with an epidural hematoma (as well as older, healed hematomas), and placed on a ventilator.

A. *Witness Interviews*

Interviewed by the caseworker, J.C., then 10, and D.S., then nearly 7, told essentially the same story. S.V. and the two older boys had gone outside to play football, leaving the baby lying on the couch. D.S. went inside briefly to get a drink of water and observed G.M. still lying on the couch, crying. A short time later, S.V. and both boys re-entered the house. S.V. placed G.M. inside his crib. As the boys were watching television, D.S. heard S.V. yell: "'The baby is

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[1] J.C.'s father, also named J.C., is deceased. D.S.'s father, J.S., resides in North Carolina and is not a party to this appeal.

unconscious.'" The boys observed that G.M. was having trouble breathing and was gasping for air. S.V. picked up the baby, shook him softly and attempted CPR. He then called Mother. Mother arrived home and called 911. Neither boy observed the baby falling or being dropped, and neither reported he had seen anyone physically abuse G.M. However, S.V. told them that someone had to take the blame, and encouraged D.S. to say he had dropped the baby. D.S. also stated that several months earlier, S.V. had thrown a hamburger at Mother during an altercation at a fast food restaurant.

The caseworker interviewed Mother.[2] Mother stated that the day before the incident, she had left G.M. alone with S.V. in their car while she ran an errand. When she returned, G.M. was crying and there was blood on his lip. S.V. denied hitting G.M. Mother did not seek medical attention for the infant.[3] Mother admitted that S.V. had pushed her once, approximately one month earlier.

During more extensive interviews that preceded the dispositional/jurisdictional hearing, J.C. and D.S. told the caseworker that although neither had observed S.V. physically injure the baby, they both recalled having seen S.V. yell at G.M. to "shut up." They had spoken to Mother about this. In addition, S.V. had called J.C. and D.S. names, had sworn at them, had hit D.S., had kicked J.C.'s dog, and had physically punished his own young children with a belt in J.C. and D.S.'s presence.[4] On at least one occasion, Mother observed S.V. kick

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[2] The report does not indicate that the caseworker interviewed S.V.

[3] During the interview, Mother admitted she had used methamphetamine on a daily basis from the ages of 16 to 21. However, she claimed to have stopped all substance abuse when she joined the Army. The court struck an allegation in the original petition that Mother's substance abuse rendered her incapable of caring for the minors.

[4] S.V.'s children were 4 and 5 at the time.

the dog and told him to stop.[5] When D.S. told Mother that S.V. had hit him, Mother refused to believe him. D.S. also overheard S.V. tell Mother that he hated D.S.

Mother told the caseworker that S.V. was "hard" on D.S. and used a belt to discipline his own children, but that she did not permit him to physically discipline her boys. She admitted S.V. yelled at her sons and swore in front of them, and that D.S. had told her S.V. hated him and "played too rough." She denied ever observing S.V. kick the dog. She said that after G.M. was hospitalized, J.C. told her that S.V. had said, referring to G.M., "'Why can't this baby stop crying, why won't he shut up?'" Mother admitted that S.V. had pushed her two or three times and had thrown a hamburger at her when they were with the boys at a fast food restaurant. At the time, S.V. was in a rage that scared her. The caseworker also learned that D.S. was not reliably toilet-trained, and that Mother had not sought counseling or other treatment to discover why he had this problem.

When G.M. first came into Mother's care, S.V. informed her he was not happy having the baby with them. He complained they did not have any time together and refused to babysit when Mother was at work. On the day of the incident, Mother accused S.V. of shaking the baby, but he denied having done so. Nevertheless, because S.V. had encouraged the older boys to lie, she believed he was hiding something.

Prior to the jurisdictional/dispositional hearing, the caseworker spoke with S.V.'s former wife, S.R., and her mother. S.R. denied ever having been physically abused, but said S.V. had an "aggressive nature" and could "go from zero to hot in

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[5] The caseworker's report also includes statements from the boys not relevant to any sustained allegation. J.C. and D.S. told the caseworker that Mother frequently threw parties at which she and her guests drank large amounts of beer, sometimes playing drinking games that required the rapid consumption of multiple glasses of alcohol. J.C. and D.S. both stated that Mother had, in the past, used a belt to discipline D.S.

a matter of a second." S.R. said S.V. had once hit one of their children so hard that the child was knocked to the ground. On another occasion, S.V. picked up the child and said: "'Shut up[;] why are you crying?" S.R.'s mother, A.R., informed the caseworker that S.V. once broke S.R.'s elbow, and that S.R. had told A.R. that S.V. had picked up one of their children by his arm and thrown him into his crib. A.R. also reported her belief that D.S. had emotional issues, as demonstrated by that fact that he frequently hit S.V.'s children (A.R.'s grandchildren).

B. *Medical Evidence*

On the day of the incident, G.M. was diagnosed with an "[e]pidural hematoma to his left temporal area," and placed on a ventilator. Medical personnel reported that the injury appeared to be a non-accidental trauma, which could have been a few days old. A CT scan revealed other, older brain injuries. The minor also had a bruise on his neck.

A child abuse specialist expressed the opinion that G.M.'s injuries were "consistent" with shaking or suffocation. The baby appeared to have been deprived of air for a considerable period of time and had suffered extensive brain damage. The specialist agreed there were "'probably'" older injuries, suggesting the minor had been shaken in the past. He concluded that G.M. was the victim of abuse and that there were no other possible reasons for his injuries. Another medical specialist who examined G.M. opined that he had been either shaken or thrown.

G.M.'s mother, C.M., reported that she had been told by medical personnel that her son would be blind, bound to a wheelchair, subject to seizures and severely mentally retarded for the rest of his life.

C. *Mother's Post-Detention Actions*

After the incident, Mother told S.V. to move out.[6] She obtained a restraining order and changed the locks on the house. She informed the caseworker that she was not going to allow S.V. to return.

DCFS recommended that Mother take a parenting class, attend NA or AA meetings two times a week, and undergo counseling to address case issues, including "how her actions [in] allowing the children [to] be exposed to domestic violence, excessive alcohol drinking, and cursing . . . affects [them]," and drug testing. DCFS also recommended counseling for the boys. By the end of July, Mother had attended five parenting classes and two counseling sessions. In addition, she had undergone two drug/alcohol tests, which were negative.

D. *Adjudication*

At the adjudication hearing, Mother stipulated to the following facts supporting jurisdiction under Welfare and Institutions Code section 300, subdivision (b):[7] (1) "On or about 5/26/08, [Mother] left [G.M.] in the care of

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[6] Four days after the incident, at the detention hearing, Mother's attorney reported to the court that Mother had ended her relationship with S.V.

[7] Statutory references are to the Welfare and Institutions Code. Section 300, subdivision (b), provides that dependency jurisdiction exists where the court finds that the children have suffered, or there is a substantial risk that they will suffer, serious physical harm or illness (1) as a result of the failure or inability of the parent to supervise or protect the children; (2) as a result of the willful or negligent failure of the child's parent to supervise or protect the child from the conduct of a custodian with whom the children have been left; (3) by the willful or negligent failure of the parent to provide the children with adequate food, clothing, shelter or medical treatment; or (4) by the inability of the parent to provide regular care for the children due to the parent's mental illness, developmental disability, or substance abuse. The petition also alleged that jurisdiction over J.C. and D.S. was appropriate under section 300, subdivision (a) (risk of serious harm inflicted non-accidentally), but the court limited its jurisdictional findings to subdivision (b).

[S.V.], when [Mother] knew or reasonably should have known of [S.V.'s] aggressive behavior towards the children. Furthermore, on or about 05/26/08, [G.M.] suffered non-accidental trauma consisting of an epidural hematoma, as a result of deliberate, unreasonable, and neglectful acts to [G.M.] by [S.V.]. Such negligent conduct by [Mother] in allowing [S.V.] to care for and have access to [G.M.], place[d] [J.C. and D.S.] at risk of harm"; (2) "On two prior occasions, [Mother] and [S.V.] engaged in physical altercations in the children's presence, in which [S.V.] pushed [Mother] . . . [and] threw food at [Mother]. [Mother] failed to take action to protect the children, in that she allowed [S.V.] to reside in the children's home, and have unlimited access to the children. [S.V.'s] physical altercations toward [Mother] and [Mother's] failure to protect the children, places the children at risk of harm."[8]

E. *Disposition*

DCFS recommended that the custody of J.C. and D.S. be taken from Mother during the reunification period. The children's counsel agreed. Mother contested disposition, seeking return of J.C. and D.S. to her physical custody.

At the contested dispositional hearing (which immediately followed adjudication), Mother testified that she had never seen S.V. physically abuse G.M. On the day she saw blood on G.M.'s lip, she believed the baby had hit himself with his bottle. She had never seen S.V. physically discipline her children. She did not see S.V. kick the dog. She admitted S.V. had pushed her twice, while they were arguing.

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[8] One additional factual allegation found true by the court pertained to J.S.'s substance abuse, not relevant here.

Mother further testified that she had had no contact with S.V. since the date of the incident. She stated that she planned to move with the boys to a new home, where S.V. would be unable to locate them. She also planned to obtain counseling for the boys.

The children's attorney, joining in DCFS's recommendation that the boys continue to be detained, noted that the report was "just fraught with poor judgment on the mother's part," and questioned whether Mother understood the seriousness of the situation. After hearing argument, the court stated: "[A]s to Mother[,] [her counsel] argued that poor judgment does not mean that there is a substantial risk of harm to her children. But when poor judgment goes to this length, where she has a man that she's involved with and moves in with her children, finds out almost immediately that this man has very violent tendencies, pushes her, throws food at her, and she has seen him [h]it his children and that her children are afraid of him, and yet leaves the children alone with him, goes away and goes to get her nails done . . . and leaves the children with him, including a baby that she is caring for, that goes beyond poor judgment."

The court made the following findings under section 361, subdivision (c) "by clear and convincing evidence": (1) "[T]here is a substantial danger or would be if the children were returned home, to their physical health, safety, protection, physical and emotional well-being, and there are no reasonable means by which the children's physical health can be protected without removing them from the parent's physical custody"; and (2) "Reasonable efforts were made to prevent and eliminate the children's removal from the home of the parents."

DISCUSSION

Mother contends substantial evidence does not support the juvenile court's decision to remove J.C. and D.S. from her physical custody. As pertinent here, the

applicable statutory standard -- found in section 361, subdivision (c) -- provides that "[a] dependent child may not be taken from the physical custody of his or her parents . . . , unless the juvenile court finds clear and convincing evidence . . . (1) [t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody." Section 361, subdivision (c)(1) requires the court to "consider, as a reasonable means to protect the minor, the option of removing an offending parent or guardian from the home" and to "also consider, as a reasonable means to protect the minor, allowing an offending parent or guardian to retain physical custody as long as that parent or guardian presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm."

Section 361 embodies a policy of """"maintaining children in their natural parent's homes where it [is] safe to do so."""" (*In re Henry V.* (2004) 119 Cal.App.4th 522, 528, quoting *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1216.) It "requires that a child remain in parental custody pending the resolution of dependency proceedings, despite the problems that led the court to take jurisdiction over the child, unless the court is clearly convinced that such a disposition would harm the child. The high standard of proof by which this finding must be made is an essential aspect of the presumptive, constitutional right of parents to care for their children." (*In re Henry V.*, *supra*, at p. 525.)

While clear and convincing evidence of parental neglect is required in the trial court to remove a child from a parent's custody, "on appeal the proper standard of review is the substantial evidence rule. 'In juvenile cases, as in other areas of the law, the power of an appellate court asked to assess the sufficiency of the evidence begins and ends with a determination as to whether or not there is any

substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact. All conflicts must be resolved in favor of [DCFS] and all legitimate inferences indulged in to uphold the [court's order], if possible. Where there is more than one inference which can reasonably be deduced from the facts, the appellate court is without power to substitute its deductions for those of the trier of fact . . . .' [Citations.]" (*In re Jason L.*, *supra*, 222 Cal.App.3d at p. 1214; accord, *In re Richard H.* (1991) 234 Cal.App.3d 1351, 1362.) "Under the substantial evidence rule, we have no power to pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or determine where the weight of the evidence lies. Rather, we 'accept the evidence most favorable to the order as true and discard the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact. [Citation.]' [Citation.] The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order. [Citation.]." (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1135, overruled in part on another ground in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, quoting *In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) The evidence need not support that the minors were actually harmed to support the appropriateness of removal. "The focus of the statute is on averting harm to the child[ren]." (*In re Diamond H.*, *supra*, 82 Cal.App.4th at p. 1136.)

There is ample evidence here to support the juvenile court's ruling. The injuries S.V. inflicted in his prior marriage demonstrated the physical danger he posed to family members. In the few months Mother and S.V. lived together, S.V. had demonstrated his abusive nature by pushing her, throwing things at her, hitting his young children with a belt, kicking the family dog, and hitting D.S., whom he claimed to "hate." Thus, as Mother conceded when she waived challenge to the jurisdictional findings, she "knew or reasonably should have known of [S.V.'s] aggressive behavior towards the children."

Mother contends that the "very instant" she learned of the danger posed by S.V., she "acted decisively to protect [G.M.]." The evidence demonstrates otherwise. The medical evidence of past physical abuse discovered when G.M. was examined demonstrated that the abuse which led to his hospitalization was not a one-time occurrence. J.C. and D.S.'s statements supported that, at a minimum, Mother was aware that when G.M. demonstrated normal infant behavior by crying, S.V. grew angry, yelled, and swore. She was also aware that S.V. was unhappy with Mother's decision to care for the baby while his parents were in Iraq. Yet when Mother left G.M. and S.V. alone in the car and returned to find G.M. with a bloody lip, she did nothing. Her explanation -- that she believed a months-old infant capable of swinging a bottle hard enough to bloody his lip -- strains credulity.

Mother emphasizes that she undertook all the right actions after G.M.'s horrendous injuries came to light -- breaking up with S.V., changing the locks, and obtaining a restraining order. All of these actions were undertaken when the scrutiny of the court and DCFS was focused on her. The court was not required to base its ruling on after-the-fact actions when Mother's prior behavior indicated an unwillingness to protect the minors in her custody.

Mother claims that from the onset of the investigation, she was "forthcoming and cooperative." To the contrary, she was not forthcoming about the incident in which S.V. threw a hamburger at her, discussing it only after her sons had brought it to the caseworker's attention. Moreover, she first claimed S.V. had pushed her only once and later admitted it had happened "two or three" times. She denied knowing that S.V. abused the dog or that he had hit D.S., but J.C. and D.S. both claimed to have told her these things. This demonstrated a tendency to minimize or overlook signs of dangerousness on the part of her male companion, which the court could take into account in determining that the boys should not be left in her

custody prior to a period of reunification services geared toward resolving the psychological issues that led to this behavior.

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.